

Michael N. Milby, Clark

887

((

Page

Table of Authorities

	Page(s)
Cases	
<i>Allied Mech. and Plumbing Corp. v. Dynamic Hostels Housing Dev. Fund Co., Inc. (In re Allied Mech.),</i> 62 B.R. 873 (Bankr. S.D.N.Y. 1986)	19
<i>Aviall Servs., Inc. v. Cooper Indus., Inc.,</i> 263 F.3d 134 (5 th Cir. 2001)	8
<i>Avitts v. Amoco Prod. Co.,</i> 53 F.3d 690 (5 th Cir. 1995).....	14
<i>Banihashemrad v. Lufthansa Cargo AG,</i> 28 F. Supp. 2d 1014 (W.D. Tex. 1998).....	3
<i>Borne v. New Orleans Health Care, Inc.,</i> 116 B.R. 487 (E.D. La. 1990).....	19, 20
<i>Campell v. C.D. Payne and Geldermann Sec, Inc.,</i> 894 S.W.2d 411 (Tex. App. 1995).....	12
<i>Drawhorn v. Qwest Communications Int'l, Inc.,</i> 121 F. Supp. 2d 554 (E.D. Tex. 2000).....	3
<i>Fed. Deposit Ins. Corp. v. Majestic Energy Corp.</i> <i>(In re Majestic),</i> 835 F.2d 87 (5 th Cir. 1988)	15, 16
<i>Feld v. Zale Corp. (In re Zale),</i> 62 F.3d 746 (5 th Cir. 1995).....	17
<i>Flores v. Baldwin,</i> No. Civ.A. 301CV2873P, 2002 WL 1118504 (N.D. Tex. May 28, 2002)	20, 21
<i>Free v. Abbott Labs. (In re Abbott Labs.),</i> 51 F.3d 524 (5 th Cir. 1995)	12, 13
<i>Grotjohn Precise Connexiones Int'l, S.A. v. Jem Fin., Inc.,</i> 12 S.W.3d 859 (Tex. App. 2000).....	12
<i>Halper v. Halper,</i> 164 F.3d 830 (3d Cir. 1999)	18
<i>In re Canon,</i> 196 F.3d 579 (5 th Cir. 1999).....	15
<i>In re Georgou,</i> 157 B.R. 847 (N.D. Ill. 1993)	19
<i>In re Sunpoint Secs., Inc.,</i> 262 B.R. 384 (Bankr. E.D. Tex. 2001)	16, 17

<i>Korinsky v. Salomon Smith Barney Inc.</i> , No. 01 Civ. 6085 (SWK), 2002 WL 27775 (S.D.N.Y. Jan. 10, 2002).....	5
<i>Mackey v. Lanier Collection Agency & Serv., Inc.</i> , 486 U.S. 825 (1988).....	8
<i>MSR Exploration Ltd. v. Meridian Oil, Inc.</i> , 74 F.3d 910 (9 th Cir. 1996)	4
<i>Pell v. Weinstein</i> , 759 F. Supp. 1107 (M.D. Pa. 1991), <i>aff'd</i> , 961 F.2d 1568 (3d Cir. 2002).....	9
<i>Prager v. Knight/Trimark Group, Inc.</i> , 124 F. Supp. 2d 229 (D. N.J. 2000).....	5
<i>Republic Reader's Serv., Inc. v. Magazine Serv. Bureau, Inc.</i> (<i>In re Republic Reader's</i>), 81 B.R. 422 (Bankr. S.D. Tex. 1987).....	20
<i>Roots v. P'ship v. Land's End, Inc.</i> , 965 F.2d 1411 (7 th Cir. 1992)	9
<i>Searsy v. Commercial Trading Corp.</i> , 560 S.W.2d 637 (Tex. 1977).....	12
<i>Stromberg Metal Works, Inc. v. Press Mech., Inc.</i> , 77 F.3d 928 (7 th Cir. 1996)	13
<i>Tuchman v. DSC Communications Corp.</i> , 14 F.3d 1061 (5 th Cir. 1994)	9
<i>United Mine Workers of America v. Gibbs</i> , 383 U.S. 715 (1966).....	10
<i>Wilson v. Republic Iron & Steel Co.</i> , 42 S. Ct. 35 (1921)	7
<i>Wood v. Wood (In re Wood)</i> , 825 F.2d 90 (5 th Cir. 1987)	15, 17
<i>WRT Creditors Liquidation Trust v. C.I.B.C. Oppenheimer Corp.</i> , 75 F. Supp. 2d 596 (S.D. Tex. 1999).....	19, 20
<i>Zahn v. Int'l Paper Co.</i> , 414 U.S. 291 (1973)	13

Rules and Statutes

15 U.S.C. § 78(a)	5
15 U.S.C. § 78bb(f).....	5, 6, 7, 8

28 U.S.C. § 1332.....	12
28 U.S.C. § 1334.....	passim
28 U.S.C. § 1367.....	passim
28 U.S.C. § 1452.....	2, 15
Rule 10b-5 of the Securities Exchange Act of 1934.....	11, 12
Section 11 of the Securities Act of 1933	11, 12
TEX. BUS. & COMM. CODE § 27.01	2
TEX. CIV. PRAC. & REM. CODE ANN. § 32.012 (Vernon’s 2002).....	16
TEX. R. JUD. ADMIN. 11.4(h)	6
TEX. R. JUD. ADMIN. 11.5.....	6
TEX. REV. CIV. STAT. ANN. Art. 581-10 <i>et seq</i>	2
TEX. REV. CIV. STAT. ANN. Art. 581-33 (Vernon’s 2002).....	11

Other Authorities

H.R. Conf. Rep. No. 105-803 (1998).....	5, 8
S. Rep. No. 105-182 (1998), 1998 WL 226124.....	8

Defendant J.P. Morgan Chase & Co. (“JPMorgan Chase” or “Defendant”)

respectfully submits this response and the exhibits attached hereto, in opposition to the Motion to Remand (“Remand Motion”) filed by plaintiffs the American National Insurance Company, *et al.* (together the “American National Companies” or “Plaintiffs”).

PRELIMINARY STATEMENT

Plaintiffs in this action allege that they were purchasers of preferred stock, bonds and commercial paper of Enron Corporation and its affiliates (“Enron”). Plaintiffs further assert that they were induced to purchase Enron securities because of Enron’s failure to disclose its true financial picture.

((

Plaintiffs do not allege that they purchased any securities from JPMorgan Chase or, for that matter, that Plaintiffs and JPMorgan Chase had any type of relationship or dealings. Plaintiffs likewise do not allege that JPMorgan Chase was in any way involved in the preparation or certification of Enron's financial statements, or that Plaintiffs purchased Enron securities in reliance on any statement by JPMorgan Chase. To the contrary, Plaintiffs have filed a separate lawsuit, which is also pending in this Court, against those who Plaintiffs say participated in the issuance of false and misleading financial statements on which Plaintiffs purportedly relied. *See American National Insurance Co., et al. v. Arthur Andersen, L.L.P., et al.*, Civil Action No. G-02-0084 (S.D. Tex.) (now consolidated in *Newby, et al. v. Enron Corp., et al.*, Civil Action No. H-01-3624 ("Newby")). In contrast to their allegations against the other defendants, Plaintiffs allege in their petition in this case (the "Petition") only that *Enron* improperly accounted for certain transactions it conducted with JPMorgan Chase and that JPMorgan Chase "knew or should have known" of Enron's alleged misconduct.

Plaintiffs' claims echo those made against JPMorgan Chase and others in the lead *Newby* case. However, Plaintiffs commenced their action in Texas state court asserting claims under the Texas Securities Act,¹ Texas statutory fraud in a stock transaction,² and for common law fraud against JPMorgan Chase. JPMorgan Chase timely removed the action and the case has been consolidated in the lead *Newby* case. *See* Ex. A attached hereto, May 14, 2002 Order.

Plaintiffs now move to remand the case to Texas state court. However, this Court has subject matter jurisdiction over this action and the Remand Motion should be denied.

¹ TEX. REV. CIV. STAT. ANN. Art. 581-10 *et seq.*

² TEX. BUS. & COMM. CODE § 27.01.

First, this Court has subject matter jurisdiction because Plaintiffs allege state law-based securities class action claims expressly preempted by the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), 15 U.S.C. section 78, *et seq.*

Second, this Court has supplemental jurisdiction under 28 U.S.C. section 1367 because Plaintiffs’ claims are so closely related, and supplemental to, other federal claims now pending before this Court in *Newby*.

Finally, this Court has bankruptcy jurisdiction over this action under 28 U.S.C. section 1452 because Plaintiffs’ claims are related to the Enron bankruptcy.

Plaintiffs’ Remand Motion is rife with misinterpretations of applicable cases and statutes. Plaintiffs rely on the “well-pleaded complaint rule,” a flimsy shelter they clearly anticipated as they constructed their tactically pled Petition. Plaintiffs’ Petition, however, is not well-pled, but rather *artfully* pled, designed to avoid proper federal jurisdiction. Similar attempts to avoid federal jurisdiction through tactical pleadings have been recently rejected by Texas federal courts.³ Despite Plaintiffs’ attempts to tactically plead their way out of this Court, there is ample authority for federal subject matter jurisdiction over this action.

³ Courts developed the “artful pleading doctrine” precisely to counter the use of the well-pleaded complaint rule as a weapon for avoiding federal jurisdiction. The Eastern District of Texas recently found that “the Fifth Circuit has held that district courts ‘should inspect the complaint carefully to determine whether a federal claim is necessarily presented, even if the plaintiff has couched his pleading exclusively in terms of state law. The reviewing court looks to the substance of the complaint, not the labels used in it The artful pleading doctrine “does not convert legitimate state claims into federal ones, but rather reveals the suit’s necessary federal character.” *Drawhorn v. Qwest Communications Int’l, Inc.*, 121 F. Supp. 2d 554, 559-60 (E.D. Tex. 2000) (internal citations omitted) (holding removal proper where plaintiffs’ state law claims raise substantial issues of federal law). *See also Banihashemrad v. Lufthansa Cargo AG*, 28 F. Supp. 2d 1014, 1016 (W.D. Tex. 1998) (invoking artful pleading doctrine to find that state law claims “merely cloak[ed]” federal questions).

((

In a final attempt to keep their action out of federal court, Plaintiffs argue that this Court should abstain from hearing this case. This argument similarly fails. Mandatory abstention does not apply here because: (1) this action does not involve purely state law questions and could have been commenced in federal court on grounds other than bankruptcy jurisdiction; and (2) Plaintiffs have not presented a shred of evidence that demonstrates that a state court action can be timely adjudicated. Similarly, comity does not require or counsel remand where, as here, considerations of judicial economy and efficiency tilt the balance in favor of this Court's adjudication of this action.

PROCEDURAL BACKGROUND

Plaintiffs filed their Petition against JPMorgan Chase on April 11, 2002, in the 56th Judicial District of Galveston County, Texas. JPMorgan Chase timely removed this action on May 6, 2002, to the United States District Court for the Southern District of Texas, Galveston Division. This matter was transferred to this Division and consolidated into the lead *Newby* case by Orders dated May 7 and May 14, 2002. Plaintiffs moved to remand this matter back to state court on May 31, 2002. Although JPMorgan Chase had already moved to dismiss the amended Consolidated Complaint in *Newby* on May 8, 2002 and no further response was required, JPMorgan Chase, in an abundance of caution, moved this Court to dismiss the Plaintiffs' pre-consolidation Petition on June 12, 2002.

Plaintiffs' Petition was filed after filing a similar Petition against Enron's auditors and various of its directors and officers, styled *American Nat'l Ins. Co. v. Arthur Andersen, L.L.P., et al.*, cause number 01CV1218. The *Arthur Andersen* Petition alleged nearly identical causes of action under the Texas Securities Act and statutory and common law fraud, with the added allegation of negligence and professional malpractice. That case has also been removed to this Court and consolidated into *Newby*. Additionally, with the above two cases now

(

consolidated into *Newby*, Plaintiffs have moved this Court to create *and lead* a subclass of plaintiffs in *Newby*. See Ex. B attached hereto, American National, *et al.*'s, Response to Cayman, L.P., *et al.*'s Motion for Scheduling Order and American National's Motion to Create Subclass and for Appointment as Subclass Representative dated May 16, 2002.

ARGUMENT

Point I.

THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THIS ACTION

A. Federal Law Preempts Plaintiffs' State Causes of Action

This Court has subject matter jurisdiction over this action because Plaintiffs' state causes of action are preempted by SLUSA. See *MSR Exploration Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 912 (9th Cir. 1996). Plaintiffs are part of a "covered class action" as defined by SLUSA. Although Plaintiffs claim that JPMorgan Chase's removal "contravene[s] Congressional intent" (Remand Motion at 7), it is Plaintiffs that are attempting an end-run around Congress's preemption of cases like this under SLUSA.

SLUSA was enacted as a result of serious concerns about securities actions brought in state courts. While Congress stated that state courts have a role to play in securities regulation, "considerable evidence has been presented to Congress that a number of securities class action lawsuits have shifted from Federal to State courts" and that, in tandem with the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Congress wanted to "prevent abuses in private securities fraud lawsuits." 15 U.S.C. § 78(a). To this end, Congress enacted SLUSA to set "national standards for securities class action lawsuits involving nationally traded securities . . ." *Id.* "The purpose of SLUSA is to 'prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State court, rather than Federal court.'" *Korinsky v. Salomon Smith Barney Inc.*, No. 01 Civ. 6085 (SWK), 2002

WL 27775, at *3-4 (S.D.N.Y. Jan. 10, 2002) (emphasis added) (denying remand to state court because of SLUSA preemption) (quoting H.R. Conf. Rep. No. 105-803 (1998)); *Prager v. Knight/Trimark Group, Inc.*, 124 F. Supp. 2d 229, 232 (D. N.J. 2000) (same).

SLUSA provides:

- (1) CLASS ACTION LIMITATIONS.—No *covered class action* based upon the *statutory or common law of any State* or subdivision thereof may be maintained in any State or Federal Court alleging—
 - (A) a misrepresentation or omission of material fact in connection with the purchase or sale of a *covered security*; or
 - (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 78bb(f)(1)(A)-(B) (emphasis added). Plaintiffs do not dispute that this case involves securities fraud claims concerning covered securities based on Texas statutory and common law. Plaintiffs only argue that this case is not a “covered class action.” Remand Motion at 8.

1. JPMorgan Chase Has Established that this Action is a Covered Class Action

SLUSA defines a covered class action as:

- (i) any single lawsuit in which—
 - (I) damages are sought on behalf of more than 50 persons or *prospective class members*, and questions of law or fact common to those persons or members of the prospective class . . . predominate over any questions affecting only individual persons or members; or . . .
- (ii) any *group of lawsuits* filed in or *pending* in the *same court* and involving common questions of law or fact, in which—
 - (I) damages are sought on behalf of more than 50 persons; and
 - (II) the lawsuits are joined, *consolidated*, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 78bb(f)(5)(B) (emphasis added).

((

A plain reading of these provisions reveals that this case is a covered class action. Plaintiffs' contention that a covered class action was alleged only in "conclusory fashion" is plainly untrue. Plaintiffs' Motion to Remand completely avoids the fact that JPMorgan Chase demonstrated in its Notice of Removal that Texas state law requires that this case be consolidated with all other Enron-related cases in Texas state courts, which would thereby produce more than the 50 plaintiffs required for SLUSA preemption. *See* Defendant's Notice of Removal, ¶ 17.

On information and belief, there are now before Texas state courts other Enron-related cases that, when aggregated together, include more than 50 plaintiffs. *See, e.g., Rosen v. Fastow*, C.A. No. H-02-0199 (removed action on behalf of the 5,700 members of the Houston Federation of Teachers). Rule 11 of the Texas Rules of Judicial Administration states that cases "involv[ing] material questions of fact and law in common to a case in another court and county" must, upon motion, be consolidated for pretrial proceedings before a pretrial judge. *See* TEX. R. JUD. ADMIN. 11.4(h). Such consolidation is mandatory, and failure to consolidate such cases is subject to mandamus review by the Texas Supreme Court. *See* TEX. R. JUD. ADMIN. 11.5. This case, when consolidated with others before Texas courts, forms a class action with the claims of well over 50 plaintiffs.⁴ The fact that JPMorgan Chase did not move, prior to removal, to consolidate these cases in Texas state court is not significant; due to the mandatory nature of such consolidation, such a motion would be a mere formality that would needlessly delay the

⁴ Defendant understands that the United States District Court for the Western District of Texas recently disagreed with this reasoning in another Enron-related action, *Bullock v. Arthur Andersen, LLP, et al.*, Civil Action No. 1:02CV278 (W.D.Tex.), which was removed by Arthur Andersen, LLP. Defendant further understands that Arthur Andersen is seeking interlocutory appeal to the Fifth Circuit, such that superceding authority may be forthcoming. Under the circumstances, this Court should defer its decision until after the Fifth Circuit has ruled on this issue.

((

removal and adjudication of this action.⁵ Furthermore, this Court has set the Enron securities litigation for trial starting December 1, 2003, and any needless delay could prejudice the ability of both parties to obtain discovery and prepare their respective cases.

Because Plaintiffs have completely failed to address these arguments, they have thereby conceded them as true. *See Wilson v. Republic Iron & Steel Co.*, 42 S. Ct. 35, 37 (1921) (“But if the plaintiff does not take issue with what is stated in the [removal] petition, he must be taken as assenting to its truth, and the petitioning defendant need not produce any proof to sustain it.”)

2. This Action is Also a Covered Class Action under §78bb(f)(5)(B)(ii)(I)

This action is a covered class action pursuant to section 78bb(f)(5)(B)(ii)(I) because Plaintiffs are part of a prospective class of persons who acquired Enron securities during a specified period.

A covered class action can also include “prospective class members.”⁶ 15 U.S.C. § 78bb(f)(5)(B)(i)(I). The *Newby* class plaintiffs have identified prospective class members as

⁵ Because this case has been consolidated by this Court into *Newby*, it is now under 78bb(f)(5)(B)(ii)(II) part of a class action asserting the claims of well over 50 plaintiffs. Plaintiffs argue that SLUSA prohibits *federal* courts from consolidating state actions to meet the 50 person requirement for a “covered class action.” They quote SLUSA’s reservation of the “discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.” 15 U.S.C. § 78bb(f)(5)(F); Remand Motion at 10. But this quote proves little. Nowhere does SLUSA prohibit a federal court from consolidating a case pending before it. Nowhere does SLUSA indicate that the power to consolidate is to be exercised *solely* by the state court. The fact that this case was consolidated by a federal court, rather than a state court, is of no moment. SLUSA governs cases that are consolidated “for any purpose.” 15 U.S.C. §78bb(f)(5)(B)(ii)(II). Plaintiffs, in fact, recognize their membership in this consolidated group by their motion to create *and lead* a subclass of plaintiffs in *Newby*.

⁶ SLUSA defines a covered class action as involving cases where “damages are sought on behalf of more than 50 persons or *prospective class members*.” 15 U.S.C. section

“all persons who acquired Enron’s publicly traded securities . . . during the Class Period [October 19, 1998 through November 27, 2001].” *Newby* Consol. Compl. ¶ 986. SLUSA therefore bars any such prospective class members from bringing any Enron-related state law securities claims, in state or federal court, because they may very well be part of the *Newby* class. This result best serves the purposes of SLUSA, which was enacted to avoid “parallel state and federal litigation.” S. Rep. No. 105-182 (1998), 1998 WL 226124, at *3. *See also* H.R. Conf. Rep. No. 105-803 (1998), *supra* at 6 (“The purpose of this title is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court.”).

In their Petition, Plaintiffs do not say when they purchased the Enron securities alleged to have caused their loss, again tactically failing to plead facts that would confer federal jurisdiction. *See* Petition ¶¶ 18, 48. Nonetheless, Plaintiffs are almost certainly part of the prospective *Newby* class. To support their securities and common law fraud claims, Plaintiffs claim that they “relied” to their detriment upon JPMorgan Chase’s alleged conduct in their “purchase of Enron stock, bonds, preferred stock, commercial paper and other securities.” *Id.* at ¶¶ 18, 57. For such reliance to be legally reasonable, such purchases must have been made in close proximity to the alleged fraudulent conduct; Plaintiffs could not have relied on misconduct

78bb(f)(5)(B)(ii)(I). Congress’s use of the disjunctive “or” indicates that it meant to preempt *both* cases where there are 50 persons, or alternatively, cases involving prospective class members; “more than 50” therefore modifies only *persons*. Furthermore, “prospective class members” are of course persons. Therefore, if the number “50” of the statute is read to modify both persons and prospective class members, then the terms are redundant and the statute essentially says “more than 50 persons or persons.” Such a reading is of course untenable, and violates the basic canon of statutory construction that a statute cannot be interpreted to render terms superfluous. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988) (“we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law”); *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134, 139-40 (5th Cir. 2001).

that occurred *after* their decision to purchase. *See Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994) (Plaintiff must show conduct which “proximately caused” plaintiff’s injury to sustain §10b securities fraud claim). *See also Roots v. P’ship v. Land’s End, Inc.*, 965 F.2d 1411, 1420 (7th Cir. 1992) (“Such post-purchase statements cannot form the basis of [§10b-5] liability, because the statements could not have affected the price at which plaintiff[s] actually purchased” the securities); *Pell v. Weinstein*, 759 F. Supp. 1107 (M.D. Pa. 1991), *aff’d*, 961 F.2d 1568 (3d Cir. 2002) (Plaintiffs did not rely on prospectus because it did not exist at time they committed to transaction). Plaintiffs assert fraudulent conduct through the year 2001, and in particular, conduct starting in 1998. Petition ¶¶ 29, 30. Therefore, if Plaintiffs purchased in reliance on fraudulent conduct from 1998 through 2001, they must have done so *after* the fraudulent conduct began. They appear from their Petition to be part of the prospective class, and have admitted as much through their motion to create and lead a subclass in *Newby*.

Finally, because SLUSA forbids any state *or federal* court from adjudicating a state law-based class action, the next logical step is the dismissal of this case. JPMorgan Chase has moved this Court to dismiss the Petition on that very ground. *See* Defendant JPMorgan Chase & Co.’s Motion to Dismiss Plaintiff’s Original Petition and Brief in Support dated June 12, 2002, at 4.

B. This Action Is Part of One Constitutional Case Before This Court

This Court presently has federal question jurisdiction over *Newby*, the consolidation of over 70 cases through which prospective class plaintiffs seek redress under federal and state securities laws. Because of the commonality of facts and similarity of claims between this action and *Newby*, these actions are so related that Plaintiffs are essentially members of the *Newby* class and the actions together form a single, constitutional case.

Congress, through its enactment of 28 Title U.S.C. section 1367, sought to ensure that all claims that form “but one constitutional case” could be adjudicated together in the interests of fairness to the parties and judicial economy. The Supreme Court, in the seminal case *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725-726 (1966), explained Section 1367’s operation and its important purpose: “[Supplemental] jurisdiction . . . exists whenever there is a [federal] claim . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional ‘case.’” The Court further explained “[t]he state and federal claims must derive from a common nucleus of operative fact Its justification lies in considerations of judicial economy, convenience and fairness to litigants” *Id.*

The required elements under Section 1367 are all present here. All of the 70-plus actions that have been consolidated into the *Newby* action share a common nucleus of operative facts.⁷ Enron’s accounting practices, its management, its energy trading activities, its equity and debt securities, its borrowing practices, and its interaction with its various bankers and business partners are all central to each of these actions. In fact, on December 12, 2001, the Honorable Lee H. Rosenthal ordered the consolidation of the more than forty (40) cases then pending in the United States District Court for the Southern District of Texas because, *inter alia*, these cases “all arise from a common core of operative facts” and contain “largely identical claims with

⁷ Indeed, as noted above, the cases consolidated into the *Newby* action include the consolidation of an action (1) by the same Plaintiffs, (2) based on the same alleged misrepresentations by Enron and the same Enron securities purchased and sold by Plaintiffs, (3) seeking recovery for the same losses alleged herein, (4) under the same laws, but simply asserted against different parties. See *American National Insurance Co., et al. v. Arthur Andersen, L.L.P., et al.*, Civil Action No. G-02-0084 (S.D. Tex.) (now consolidated in *Newby*).

overlapping legal issues.” See Ex. C attached hereto, Order of Consolidation, dated December 12, 2001. Accordingly, Judge Rosenthal ordered that:

[T]he actions involving or related to the financial difficulties of Enron Corporation, pending in the Southern District of Texas, are consolidated in the court in which the oldest case was filed in this district, which is Civil Action No. H-01-3624, *Newby v. Enron Corporation, et al.* Other actions later filed in this district relating to the same core of operative facts and issues will also be consolidated in this court.

Ex. C, Order of Consolidation at 17-18.

The claims in this case are so related with those in the rest of *Newby* that they form but one constitutional case. The *Newby* class plaintiffs’ First Claim for Relief alleges violations of Sections 10(b), 20(a) and Rule 10b-5 of the Securities Exchange Act of 1934. See *Newby*, Consol. Compl. ¶ 995. Plaintiffs here have based their claims on the Texas state law analogs to those federal statutes. Article 581-33 of the Texas Securities Act provides for liability for the same types of fraudulent conduct as Rule 10b-5 and Section 11, and includes nearly identical language.⁸ In fact, the laws are so similar that the interpretation of Texas state securities laws is largely informed by federal case law. See, e.g., *Grotjohn Precise Connexiones*

⁸ Texas Securities Act Article 581-33 (A)(2) reads: “A person who offers or sells a security . . . by means of an untrue statement of material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, is liable to the person buying the security from him” TEX. REV. CIV. STAT. ANN. Art. 581-33 (Vernon’s 2002).

Rule 10b-5 of the Securities Exchange Act of 1934 also reads: “It shall be unlawful for any person . . . to make any *untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading . . .*.”

Section 11 of the Securities Act of 1933 reads: “In case any part of the registration statement . . . contained an *untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading*, any person acquiring such security . . . may . . . sue”

(

Int'l, S.A., v. Jem Fin., Inc., 12 S.W.3d 859, 868 (Tex. App. 2000) (“Because the Texas Securities Act is so similar to the federal Securities Exchange Act, Texas courts look to decisions of the federal courts to aid in the interpretation of the Texas act.”), *citing Sears v. Commercial Trading Corp.*, 560 S.W.2d 637 (Tex. 1977) (applying federal securities law definitions to Texas Securities Act); *Campell v. C.D. Payne and Geldermann Sec, Inc.*, 894 S.W.2d 411, 417-18 (Tex. App. 1995) (same). Plaintiffs’ claims are much more than supplementary to those in *Newby*; they are, in substantial part, identical and duplicative.⁹

The Fifth Circuit explained Section 1367’s broad mandate in *Free v. Abbott Labs.* (*In re Abbott Labs.*), 51 F.3d 524 (5th Cir. 1995). There, the Court found supplemental jurisdiction over unnamed class plaintiffs who did not themselves meet the amount-in-controversy requirements for diversity jurisdiction under Title 28 U.S.C. section 1332. The Fifth Circuit based its opinion on the neither “unclear or ambiguous” text of section 1367. *Id.* at 528. “The statute’s first section vests federal courts with the power to hear supplemental claims generally, subject to limited exceptions set forth in the statute’s second section. Class actions are not among the enumerated exceptions.” *Id.* In so holding, the Fifth Circuit recognized that section 1367 had overturned *Zahn v. Int’l Paper Co.*, 414 U.S. 291 (1973), which previously denied supplemental jurisdiction over such class members. The *Abbott Labs* Court furthered the basic purpose of section 1367—to provide federal jurisdiction over parties and claims that do not

⁹ Recently, the Preferred Purchaser Plaintiffs in *Newby* voiced their concern about the omission of their Texas state law claims arising from a different time period than the *Newby* Class Period. On June 12, 2002, Judge Harmon ordered that, within twenty days of the order and upon conferring with counsel for the Preferred Purchaser Plaintiffs, Lead Counsel should either file a supplement to the Consolidated Complaint asserting the allegedly ignored state law claims or file a response to the Preferred Purchaser Plaintiffs’ Additional Memorandum if Lead Counsel decides not to file a supplement. By this order, this Court has indicated that it may exercise supplemental jurisdiction in order to adjudicate state law claims that arise from the same nucleus of operative facts as the federal claims already pending before it.

themselves have a basis for federal jurisdiction, but are closely related to those that do. This Court should similarly exercise federal jurisdiction over Plaintiffs' state law claims that closely relate to the federal questions in *Newby*.

Plaintiffs' reading of Section 1367 ignores the Fifth Circuit's clear instruction that the text of Section 1367 should be the focus of interpretation. *In re Abbott Labs*, 51 F.3d at 528. The plain language of Section 1367 requires federal courts to exercise jurisdiction over claims *and parties* that are so related to one another that they form but "one constitutional case":

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other *claims* that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional *parties*.

28 U.S.C. §1367 (emphasis added). Nowhere does Section 1367 require that supplemental claims be asserted in the same case. Nowhere in Section 1367 does it read that claims against different parties cannot be supplemental. *See Stromberg Metal Works, Inc. v. Press Mech., Inc.*, 77 F.3d 928, 932 (7th Cir. 1996) (finding in the case of two plaintiffs "[t]his strikes us as exactly the sort of case in which pendent-party jurisdiction is appropriate. It is two for the price of one: to decide plaintiff's claim is to decide both . . ."). In fact, the language of Section 1367 itself affirmatively permits the "joinder or intervention of additional parties." *Id.* at 931 (emphasis added). Plaintiffs here present no authority to support their baseless and conclusory argument that Section 1367 only provides supplemental jurisdiction over claims in the context of a single case.¹⁰

¹⁰ *Avitts v. Amoco Prod. Co.*, 53 F.3d 690 (5th Cir. 1995) is distinguishable from the facts of this case. In *Avitts*, the complaint made an oblique reference to federal law claims, but subsequent pleadings and proceedings made clear that no federal claims were asserted. *Id.* at 692-93. Because there were no federal claims, there were none that would allow

((

Finally, the fairness and judicial economy rationales behind Section 1367 are particularly important here. The Enron bankruptcy is the largest corporate bankruptcy in the history of the United States. The sheer volume of related securities actions is similarly daunting. Though Plaintiffs belittle such considerations (*see* Remand Motion at 15), such considerations could not be more important here. It makes little sense for Plaintiffs to cut loose from the central federal court charged with handling Enron-related securities litigation, to avoid this Court's considerable experience with the particular facts of this matter and to run to a state court that has had little experience in this matter. Section 1367 was indeed written for cases like this, and the Court should not hesitate to use its power to promote efficiency.¹¹

C. This Case Is Related to a Pending Bankruptcy Proceeding

Under 28 U.S.C. section 1334(b), the district courts have “jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.” This case is related to the Enron bankruptcy and, therefore, removal to this Court was proper under 28 U.S.C. § 1452(a), which provides that a “party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claims or causes of action under section 1334 of this title.”

Courts in the Fifth Circuit have set forth a broad standard for “related to” bankruptcy jurisdiction. *See, e.g., Fed. Deposit Ins. Corp. v. Majestic Energy Corp. (In re*

the court to exercise its supplemental jurisdiction under section 1367. *Id.* at 693-94. Here, however, as set forth above, there are federal claims that form a part of the same case or controversy as this action, so that supplemental jurisdiction exists.

¹¹ Plaintiffs contend that this Court “clearly reject[ed] JPM's theory of ‘supplemental jurisdiction’ over [Plaintiffs’] claims” in the *Newby/Coy* Memorandum and Order, entered February 4, 2002. Remand Motion at 6. To the contrary, the Court never addressed that theory of removal in its Memorandum and Order. The Court denied remand based on SLUSA (*see* Ex. D attached hereto, Memorandum and Order at 18-22), an alternative ground on which the Court should deny Plaintiffs’ motion here.

((

Majestic), 835 F.2d 87, 90 (5th Cir. 1988) (“[W]hether federal jurisdiction over bankruptcy cases and proceedings exists is determined under § 1334(b), which is to be read as a broad grant of jurisdiction.”). A proceeding is “‘related to’ a bankruptcy ‘if the outcome of that proceeding could *conceivably* have *any effect* on the estate being administered in bankruptcy.’” *In re Canion*, 196 F.3d 579, 585 (5th Cir. 1999) (citations omitted) (holding that “related to” jurisdiction was established because outcome of third-party proceeding could have affected bankruptcy estate). *See also Wood v. Wood (In re Wood)*, 825 F.2d 90, 94 (5th Cir. 1987) (finding that federal subject matter jurisdiction existed because complaint had conceivable effect on administration of bankruptcy). The law is well established in the Fifth Circuit that the effect on the bankruptcy estate is not required to be certain but rather only *conceivable*. *In re Canion*, 196 F.3d at 587. A claim “between two non-debtors that will potentially reduce the bankruptcy estate’s liabilities produces an effect on the estate sufficient to confer ‘related to’ jurisdiction.” *Id.* at 586. *See also In re Majestic*, 835 F.2d at 90 (“[A]n action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action . . . and which in any way impacts upon the handling and administration of the bankrupt estate.”) (quotations and citations omitted). Therefore, if a dispute can conceivably have an effect on the bankruptcy estate and is thus related to the bankruptcy case, “the required nexus exists between that dispute and the bankruptcy case.” *In re Sunpoint Secs., Inc.*, 262 B.R. 384, 392-93 n.21 (Bankr. E.D. Tex. 2001) (quotations and citations omitted) (“[t]he key word in the . . . test is ‘conceivable,’ which makes the jurisdictional grant extremely broad.”).

Enron and its assets are potentially exposed in this action. First, as holders of preferred stocks, bonds, and commercial paper of Enron (*see* Petition ¶ 18), Plaintiffs are claimants in the Enron bankruptcy and this action will potentially affect those claims. Similarly, as a result of this action, JPMorgan Chase could have rights to contribution directly from the

((

Enron estate. See TEX. CIV. PRAC. & REM. CODE ANN. § 32.012 (Vernon's 2002) (expressly recognizing right to contribution action).¹² JPMorgan Chase also could have rights to contribution from Enron's directors and officers, whose liability insurance policies of approximately \$450 million are correctly considered part of the Enron estate. See Ex. E attached hereto, Motion of Certain Present and Former Directors of the Enron Corporation for Relief from the Automatic Stay to Obtain Payment and/or Advancement of Defense Costs under the Debtors' Directors and Officers Liability Insurance and ERISA Fiduciary Liability Insurance Policies filed in *In re Enron Corp., et al.*, Civil Action No. 01-16034 (U.S. Bankr. Ct. S.D.N.Y.), dated March 21, 2002. Any of those claims "could alter the debtor's rights, liabilities, options, or freedom of action" or otherwise affect "the handling or administration of the [Enron] bankrupt estate." *In re Majestic*, 835 F.2d at 90 (citations omitted) (emphasis added).

Contrary to Plaintiffs' cavalier assertion that under JPMorgan Chase's bankruptcy jurisdiction theory the entire *Newby* action should be transferred to New York, the Southern Districts of New York and Texas are working together, as part of a coordinated federal system, to adjudicate this enormous, but nonetheless predominately federal, Enron matter. The "related to" jurisdiction of the district court is broadly defined so as "to avoid the inefficiencies of piecemeal adjudication and promote judicial economy by aiding in the efficient and expeditious resolution of all matters connected to the debtor's estate." *In re Sunpoint*, 262 B.R. at 393 (quoting *Feld v. Zale Corp. (In re Zale)*, 62 F.3d 746, 752 (5th Cir. 1995) (citations omitted)). See also *In re Wood*, 825 F.2d at 90 (same). In light of these concerns, this action is more efficiently adjudicated by this Court. As noted above, this Court is the central repository of the vast majority of Enron-related securities actions. In designating this Court as the MDL venue for

¹² These claims do not depend on joining Enron in this case, but instead can be asserted by proof of claim in the bankruptcy case.

((

Enron litigation and pretrial proceedings, the Joint Panel on Multidistrict Litigation (the “MDL Panel”) recognized that centralization in this Court was “necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings (especially with respect to questions of class certification), and conserve the resources of the parties, their counsel and the judiciary.” *See* Ex. F attached hereto, *In re Enron Corp. Securities, Derivative & “ERISA” Litigation*, MDL 1446 (JPML Apr. 16, 2002), at 1.

The Southern District Bankruptcy Court—the central or “home” bankruptcy court for Enron—has itself recently recognized the advantages to the bankruptcy estate in having certain adversary proceedings related to the Enron bankruptcy proceed in this Court. On April 12, 2002, Bankruptcy Judge Arthur J. Gonzalez ordered Enron’s lawsuit against Dynegy, Inc. transferred from New York to this Court in the “interest of justice.” *See* Ex. G attached hereto, *In re Enron Corp.*, Case No. 01-16034 (AJG) (Bankr. S.D.N.Y., April 12, 2002). The court concluded that “Houston, Texas, rather than New York will better serve the interests of judicial economy, thereby promoting the economic and efficient administration of these bankruptcy estates.” *Id.* at 11.

Finally, Plaintiffs’ allegation that JPMorgan Chase is required to analyze Plaintiffs’ claims to prove bankruptcy jurisdiction is baseless. Plaintiffs cite no cases to support the proposition that JPMorgan Chase is required to ascertain whether Plaintiffs’ claims are “core” or “non-core” to demonstrate that removal grounded on bankruptcy jurisdiction is proper. Remand Motion at 13. Rather, the case that Plaintiffs cite—*Halper v. Halper*, 164 F.3d 830, 838 (3d Cir. 1999)—addresses the scope of a bankruptcy court’s power to adjudicate claims, not whether a claim should be remanded to state court. The *Halper* court stated that the analysis of a proceeding as “core or non-core [] is crucial in bankruptcy cases because it defines both the *extent* of the Bankruptcy Court’s jurisdiction, and the *standard* by which the District Court

reviews its factual findings.” *Id.* at 836 (emphasis added). Thus, the issue presented in *Halper* was a matter of the appropriate scope of the bankruptcy court’s jurisdiction vis-à-vis the district court, *not* whether federal jurisdiction existed. The issue before this Court is whether federal jurisdiction exists, which it does. Plaintiffs’ argument is wholly without merit and their motion to remand should be denied.

Point II.

THIS COURT SHOULD NOT ABSTAIN FROM HEARING THIS CASE

A. Mandatory Abstention Does Not Apply

Plaintiffs claim that this Court must abstain from exercising jurisdiction over this case pursuant to 28 U.S.C. Section 1334(c)(2), which provides:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

Section 1334(c)(2) only applies in the event that the sole basis for removal of an action is bankruptcy jurisdiction. However, removal of this present action is warranted based on federal question and supplemental jurisdiction. This action does not involve purely state law questions and could have been commenced in or removed to the federal courts, even absent “related to” bankruptcy jurisdiction. As demonstrated above, SLUSA preempts the state law securities claims, such that the American National Companies’ claims *should* have been brought in federal court. The state law claims are also supplemental to the claims of the *Newby* plaintiffs under section 1367, and could have been asserted in federal court along with the federal questions in *Newby*.

((

Plaintiffs have also failed to show that this action “can be timely adjudicated . . . in a State forum of appropriate jurisdiction.” 28 U.S.C. § 1334(c)(2). On this issue, the burden of proof is on Plaintiffs. The party moving for abstention “must present to the court evidence that demonstrates that the state court action can be timely adjudicated.” *In re Georgou*, 157 B.R. 847, 851 (N.D. Ill. 1993) (denying motion for mandatory abstention); *see Borne v. New Orleans Health Care, Inc.*, 116 B.R. 487, 494 (E.D. La. 1990) (holding that a plaintiff’s “failure to demonstrate that the state proceeding can be timely adjudicated removes this case from the mandatory scope of § 1334(c)(2).”). Merely conclusory pleadings by a plaintiff are insufficient. *See WRT Creditors Liquidation Trust v. C.I.B.C. Oppenheimer Corp.*, 75 F. Supp. 2d 596, 605-606 (S.D. Tex. 1999) (“A naked assertion that the matter can be timely adjudicated in the state court, without more is insufficient to satisfy the requirement [of mandatory abstention].”) (quoting *Allied Mech. and Plumbing Corp. v. Dynamic Hostels Housing Dev. Fund Co., Inc. (In re Allied Mech.)*, 62 B.R. 873, 878 (Bankr. S.D.N.Y. 1986)).

The Enron litigations—of which this is one—feature an enormous volume of very complex financial transactions and detailed accounting issues; to adjudicate this case in a “timely” fashion would be a formidable challenge for any jurisdiction. Yet Plaintiffs make no attempt to present evidence showing that this can be achieved in the District Court of Galveston County, Texas. Instead, Plaintiffs conclusorily assert that “the state court action may be timely adjudicated.” Remand Motion at 14. Such a “naked assertion” is insufficient to satisfy the necessary requirement under mandatory abstention. *WRT Creditors*, 75 F. Supp. 2d at 605-06. This Court, on the other hand, has already set a trial date of December 1, 2003—a very early date for a case of such enormous complexity. There is serious doubt that a comparably prompt resolution would be possible in Galveston state court. Absent evidence that this case can be

“timely adjudicated” in state court, mandatory abstention does not apply. *See Borne*, 116 B.R. at 494.

B. Comity Does Not Require or Counsel Remand

Contrary to Plaintiffs’ assertions, this Court should not abstain from hearing this case in the interest of comity with the Texas courts. Title 28 U.S.C. Section 1334(c)(1) provides that “[n]othing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding . . . related to a case under title 11.”

In deciding whether to exercise its discretionary power under Section 1334(c)(1), the Court “must apply a twelve (12) factor checklist to determine whether it should abstain in favor of a state court’s adjudication of an issue.” *Flores v. Baldwin*, No. Civ.A. 301CV2873P, 2002 WL 1118504, at * 6 (N.D. Tex. May 28, 2002). *See also Republic Reader’s Serv., Inc. v. Magazine Serv. Bureau, Inc. (In re Republic Reader’s)*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987) (listing twelve factors). The factors include:

- (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention;
- (2) the extent to which state law issues predominate over bankruptcy issues;
- (3) the difficulty or unsettled nature of the applicable law;
- (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court;
- (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334;
- (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
- (7) the substance rather than form of an asserted “core” proceeding;
- (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;

- (9) the burden of [the bankruptcy court's] docket;
- (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;
- (11) the existence of a right to a jury trial; and
- (12) the presence in the proceeding of non-debtor parties.

Flores, 2002 WL 1118504, at *6-7.

Plaintiffs make no showing whatsoever that these 12 factors compel abstention based on considerations of comity. What is clear, however, is that these 12 factors are based on considerations of judicial economy and efficiency in the administration of cases related to the bankrupt estate. To that end, this Court recently emphasized the dangers of duplicative litigation in its recent decision enjoining the prosecution of Texas state court actions. *See* Ex. H attached hereto, Memorandum and Order, *Newby, et al., v. Enron Corp., et al.*, Civil Action No. H-01-3624, dated May 1, 2002. In that decision, the Court held that burdensome discovery requests in state court actions would impermissibly interfere with its conduct of the consolidated class actions in federal court. *Id.* at 5-7. Not only would “extensive document production . . . in the state case[s] . . . interfere with the ordered adjudication of [the] consolidated cases,” but it would insure that “any co-ordinated efforts to resolve [the consolidated class actions] prior to a trial on the merits . . . will be fruitless.” *Id.* at 4-5. To preserve its “ability to control the consolidated litigations,” this Court stayed all discovery in the state actions and ordered the state plaintiffs to withdraw their motions for injunctive relief. *Id.* at 10-11.

CONCLUSION

For the foregoing reasons, Defendant JPMorgan Chase respectfully requests that this court deny the Plaintiff American National Companies' Motion to Remand, and that it provide such other relief as it may deem just and proper. JPMorgan Chase further requests oral argument on this matter pursuant to Local Rule 7.5.

Dated: Houston, Texas

June 19, 2002

Respectfully submitted,

MITHOFF & JACKS, L.L.P.

By: 

Richard W. Mithoff
State Bar No. 14228500

Janie L. Jordan
State Bar No. 11012700

One Allen Center, Penthouse
500 Dallas Street, Suite 3450
Houston, Texas 77002
Phone: (713) 654-1122
Fax: (713) 739-8085

Charles A. Gall
Texas Bar No. 07281500
S.D. Tex. Bar No. 11017
James W. Bowen
Texas Bar No. 02723305
S.D. Tex. Bar No. 16337
JENKENS & GILCHRIST,
A Professional Corporation
1445 Ross Avenue, Suite 3200
Dallas, TX 75202
Telephone: (214) 855-4500
Telecopier: (214) 855-4300

Thomas C. Rice
John D. Roesser
SIMPSON THACHER & BARTLETT
425 Lexington Avenue
New York, NY 10017
Phone: (212) 455-2000
Fax: (212) 455-2502

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served by electronic mail to the temporary website on this 19th day of June, 2002, and that on the same day an additional copy was served on counsel for American National Insurance Co., et al. via electronic mail, facsimile and certified mail.



RICHARD WARREN MITHOFF

The Exhibit(s) May
Be Viewed in the
Office of the Clerk